No. 84-254

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LEMAN L. HUTCHINSON, JR.
Lance Corporal, U.S. Marine Corps
Petitioner

V.

UNITED STATES OF AMERICA
Respondent

Petition For A Writ Of Certiorari To The United States Court Of Military Appeals

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PETITIONER'S REPLY BRIEF

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INTRODUCTION

The principal thrust of Respondent's argument in the brief in opposition is that this Court's decisions in *Ballew v. Georgia*, 435 U.S. 223 (1978), and *Burch v. Louisiana*, 441 U.S. 130 (1979), should not apply to courts-martial because Congress has considered the separate and special needs of the military in requiring no more than a five-member panel and a two-thirds vote for conviction at a general court-martial.

It is this point, then, that will be addressed below.

ARGUMENT

1. Respondent asserts that, for nearly 200 years, Congress has looked to the needs of the military to justify its judgment that a five-member panel and a nonunanimous verdict are constitutionally sufficient. In fact, these issues of minimum jury size and percentage to convict did not take on the constitutional significance they have today until this Court addressed them in *Ballew* and *Burch*, a mere six and five years ago, respectively. Since that time, to Petitioner's knowledge, Congress has not seriously addressed them at all. It is, therefore, more to the point to assert that Congress has exercised *no* judgment in this area *since* the spotlight of constitutional scrutiny has shown upon it.

Furthermore, it cannot be seriously argued that Congress would, upon close examination today, accept a statutory scheme for servicemembers that is constitutionally deficient under *Ballew* and *Burch* unless it was convinced by overwhelming evidence that such a departure from civilian standards of criminal justice was vital to military preparedness. In the press of other business, however, this close examination has simply not been made.

Finally, even if it were true that Congress had examined and rejected the application of *Ballew* and *Burch* to the question presented on the basis of military necessity, its inaction should not deter this Court from addressing the question itself. This is, after all, a constitutional question that challenges the very integrity of a system that convicts thousands of American soldiers, sailors, airman and marines each year.[1] Judicial deference to

[1] It is the *only* system of criminal prosecution in the Nation that does not comport with *Ballew* and *Burch*.

legislative examination (and a *presumed* one at that) for constitutional sufficiency is not consistent with the historic judicial review function of the Supreme Court. *Marbury v. Madison*, 5 U.S. (1 Cranch) 60 (1803). In *Ballew* and *Burch*, this Court did not yield to a determination of constitutional sufficiency by the legislative bodies of Georgia and Louisiana, respectively. Nor should it now.

2. Whoever does examine the question presented in light of the needs and exigencies of the armed forces will recognize that today's military community bears no resemblance to the one that existed in 1786[2] in terms of those factors that bear upon the question.

a. While the armed forces in the early days of the Republic were certainly limited in size, there are now over two million men and women in uniform within the

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[2] 1786 is the year of an incident described by Respondent as an example of the difficulty faced by military commanders of small remote units in convening large number panels for general courts-martial. That incident, according to Respondent, convinced Congress to reduce the general court-martial minimum number to five officers. Not only is the incident too old to be relevant, the effect of the incident was inaccurately conveyed. Congress did amend the Articles of War in that year to allow a general court-martial with as few as five members *but* it added a provision that no less than thirteen shall serve unless that number would cause manifest injury to the service. *See Smallridge, The Military Jury Selection Reform Movement*, 19 Air Force Law Review 343 (1978). That requirement that a panel of less that thirteen sit only in the case of "mainfest injury" continued through the Articles of War of 1916. Act of 29 August 1916, Ch. 418, 39 Stat. 650, 651.

Department of Defense[3] of whom in excess of 288,000 are commissioned officers.[4] While some of these servicemembers do serve in small remote units, that fact has little to do with the question presented. It is only the large populated units wherein general courts-martial routinely take place.[5] For example, at Marine Corps Base, Camp Lejeune, North Carolina, where Petitioner was court-martialed, there are over 34,500 Marine Corps personnel of whom 2,800 are officers.[6]

Moreover, the number of those senior officers who may convene a general court-martial are limited. Presently, there are approximately 100 unit commanders in the Army and 45 in the Air Force authorized to do so. Approximately 84 Navy and 30 Marine Corps unit commanders routinely convene general courts-martial as well.[7] Each of these commanders has, at his disposal, a large pool of officers from which to draw court members, from his own staff and subordinate units. Indeed, it is

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[3] These figures reflect approximate manpower strength as of 30 September 1984 and were obtained from the personnel or manpower offices of the different services.

[4] The number of commissioned officers is significant because it is from that group that all court-martial members are selected unless the accused requests enlisted members. In that case, at least one-third of the panel must consist of enlisted members. Article 25, U.C.M.J., 10 U.S.C. § 825.

[5] It must be emphasized that Petitioner challenges only the number and percentage to convict at a *general* court-martial, the only form of court-martial authorized to try capital cases and to adjudge long term imprisonment. Article 18, U.C.M.J.; 10 U.S.C. § 818.

[6] Figures supplied by the Public Affairs Office, Camp Lejeune.

[7] Figures supplied by the office of the respective Judge Advocate General for each service.

common practice to appoint a number greater than the minimum number of five to provide for challenges as well as to expose a greater number of officers to the military justice system as part of their professional growth.

b. The military justice system itself has experienced tremendous change in this century alone. The most significant and best known advance in the system was, of course, the passage of the Uniform Code of Military Justice in 1950. The Code, however, is just the tip of the iceberg.

Over the last 30 years (particularly since 1975), the Court of Military Appeals has drastically altered the balance between the rights of the individual and the traditional prerogatives of the military commander.[8] The system now bears striking resemblance to criminal justice in the civilian sector, particularly in the application of the constitutional rights of a criminal defendant to a servicemember accused of crime.[9] *United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249, (1967) (citing *Burns v. Wilson*, 364 U.S. 137, 149 (1953)). In *Tempia*, the Court of Military Appeals applied this Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966) to the custodial interrogation of a servicemember. *See also United States v. Ezell*, 6 M.J. 307 (C.M.A. 1979) (necessity that military search warrant be issued by neutral and detached officer).

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[8] *See* Cooke, *The United States Court of Military Appeals, 1975-1977: Judicializing the Military Justice System*, 76 Mil. L. Rev. 43 (Spring 1977); Douglass, *The Judicialization of Military Courts*, 22 Hast. L. J. 213 (1971).

[9] Even a cursory examination of recent case law in this area reveals a nearly wholesale extension of constitutional rights to

(Footnote Continued on next page)

The Court of Military Appeals has even allocated the burden of showing that military conditions necessitate a more restrictive application of the Bill of Rights to servicemembers on the party arguing for a different application. *Courtney v. Williams*, 1 M.J. 267, 270 (C.M.A. 1976).

It is particularly significant that, through court decision or by act of Congress, every one of the rights listed in the sixth amendment has been extended to military accuseds save the one addressed by this Court in *Ballew* and *Burch:* the right to trial by jury. *See United States v. McGraner*, 13 M.J. 408 (C.M.A. 1982) (right to speedy trial is constitutional as well as statutory); *United States v. Annis*, 5 M.J. 351 (C.M.A. 1978) (right to effective assistance of counsel); *United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977) (right to public trial); *United States v. Iturralde-Aponte*, 1 M.J. 196 (C.M.A. 1975) (right to compulsory process to obtain witnesses); *United States v. Jacoby*, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960) (right to confront witnesses); *United States v. Dean*, 5 U.S.C.M.A. 44, 17 C.M.R. 44 (1954) (right to trial by *impartial* trier of

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(Footnote 9 Continued)
military accuseds. *E.g., United States v. Clifton*, 15 M.J. 26 (C.M.A. 1983) (right of accused to remain silent when confronted with accusation of wrongdoing); *Cooke v. Orser*, 12 M.J. 335 (C.M.A. 1982) (servicemember entitled to fifth amendment right to due process); *United States v. Cotton*, 10 M.J. 260 (C.M.A. 1981) ("beyond reasonable doubt" is the constitutionally required standard to establish guilt); *United States v. Stuckey*, 10 M.J. 347 (C.M.A. 1981) (fourth amendment right against unreasonable search and seizure shields servicemember); *United States v. Strangstalien*, 7 M.J. 225 (C.M.A. 1979) (government bears the burden of proof of guilt); *United States v. Scoby*, 5 M.J. 160 (C.M.A. 1978) (due process requirement that criminal statute gives fair notice of punishable conduct).

fact); Article 10, U.C.M.J., 10 U.S.C. § 810 (speedy trial and right to be informed of charges against the accused).

In summary, today's military society is large and structured well enough to absorb the potential "burden" of compliance with *Ballew* and *Burch* in the same manner it has absorbed the application of virtually every other constitutional right afforded the criminal defendant. Respondent has simply not supported his position that military necessity and separateness justify noncompliance.[10] At the very least, the petition should be granted to allow exhaustive treatment of his "military necessity" argument.

3. Respondent refers to a number of decisions of this Court in support of his position that the Court should take a "hands off" approach to this issue; that it should continue to defer to Congress in the exercise of its power

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[10] Respondent also argues that Congress could have concluded that retrials were too high a price to pay in the military and, therefore, opted for a less than unanimous verdict. In fact, the Uniform Code of Military Justice authorizes a rehearing at five different levels of review or appeal. Article 64, permits the officer who convened the court-martial to disapprove the findings and order a rehearing. Article 66, authorizes the service court of military review to set aside findings of guilty and order a rehearing. Article 67 grants the same authority to a Court of Military Appeals. Article 69 authorizes the Judge Advocate General of the service involved to set aside findings of guilty and order a rehearing for those cases not reviewed by the court of military review. Finally, under Article 73, the accused himself may petition the Judge Advocate General for a new trial and receive one if he presents good cause within two years of the date the sentence is approved. If Congress truly feared for the effect of retrials on the military mission, it would not have created so many opportunities for them.

to "make Rules for the Government and Regulation of the land and naval forces." U.S. Const. art. I, sec. 8, cl. 14; *See e.g., Middendorf v. Henry*, 425 U.S. 25 (1976); *Burns v. Wilson*, 346 U.S. 137 (1953).

Petitioner disagrees with this position for another reason in addition to those set forth above. Those decisions upon which Respondent relies came to the Court via the avenue of collateral attack. There were no means available to directly petition this Court from an adverse decision of the Court of Military Appeals. The absence of a direct avenue for petition lends support to the contention that Congress did intend to insulate the military justice system (including its own military legislation) from detailed review by this Court.

The Military Justice Act of 1983[11] has changed the process entirely. The Act amended 28 U.S.C. 1259 (1) to allow petitions to this Court from an adverse decision of the Court of Military Appeals. Congress must have intended, by this amendment, that this Court subject the military justice system to the same degree of examination for constitutional sufficiency that it applies to the other criminal justice systems in the Nation. The "hands off" approach no longer applies.

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[11] Pub. L. No. 98-209, 97 Stat. 1393 (1983).

CONCLUSION

Surely, application of all the constitutional safeguards to military accuseds to date must have, to some degree, hindered the efficient conduct of the military mission. Yet, time after time, the courts or Congress have determined that their application was necessary to a just system of criminal prosecution within the military. In light of this unshakable trend, and considering the size and concentration of servicemembers (including officers) at routine general court-martial sites and the decisions of this Court in *Ballew* and *Burch*, the question of the constitutional sufficiency of the general court-martial panel size and percentage necessary to convict should be addressed by this Court. The petition for writ of certiorari should be granted.

Respectfully submitted.

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